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Re: In The Matter of Elementis Chromium, Inc.
Docket No. TSCA-HQ-2010-5022

Dear Sir or Madam:

Enclosed for filing, please find Respondent Elementis Chromium Inc.'s Post-Argument Brief and Response to Requests from the Environmental Appeals Board in the above-referenced matter.

Thank you for your assistance and cooperation.

Respectfully submitted,

John J. McAleese III

JJM:drw

Enclosure

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
Elementis Chromium Inc., f/k/a Elementis Chromium, L.P.,	)	Docket No. TSCA-HQ-2010-5022
Respondent.	)	

ELEMENTIS CHROMIUM INC.'S POST-ARGUMENT BRIEF AND RESPONSES TO REQUESTS FROM THE ENVIRONMENTAL APPEALS BOARD

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ELEMENTIS CHROMIUM INC.'S POST-ARGUMENT BRIEF AND RESPONSES TO REQUESTS FROM THE ENVIRONMENTAL APPEALS BOARD

Respondent Elementis Chromium Inc. ("Elementis"), through its undersigned counsel, hereby submits its Post-Argument Brief and provides its responses to the three questions presented by the Environmental Appeals Board (the "Board") in its Corrected Order Requiring Additional Information dated October 9, 2014 (the "Order"). In addition, several other issues raised at oral argument held before the Board on October 30, 2014, are addressed.

A. STATUTE OF LIMITATIONS AND PENALTY CALCULATION ISSUES RAISED BY THE BOARD OR AT ORAL ARGUMENT

1. Explain the relevance, if any, of the continuing violation exception to the statute of limitations in 28 U.S.C. § 2462 to determining whether "a violation continues" under TSCA section 16(a)(1), 15 U.S.C. § 2615(a)(1).

The first issue in determining whether a penalty can be assessed is to determine whether an action has been timely brought. If the action is not timely, then no penalty can be assessed -- whether using a "single violation, single penalty approach" or the "violation continues and each day penalized separately approach." Thus, one way in which the statute of limitations exception

is relevant to Section 16(a)(1) is that if a case is brought more than five years after the claim "first accrues" and the continuing violation exception does not apply, one never even reaches the question of which Section 16(a)(1) penalty provision to apply. That is this case -- the continuing violation exception to the statute of limitations does not apply, the case has not been timely brought, and no penalty can be assessed.

On the other hand, if – and only if – the continuing violation exception applies to save an action that would otherwise be untimely, a penalty can be imposed. And in such a circumstance, the next step is to determine the size of that penalty, including determining what the maximum lawful legal penalty could be (noting that a maximum penalty is rarely, if ever, applied). To make that determination, one then turns to Section 16(a)(1) and chooses whether to apply the first sentence or the second, i.e. the Board must determine whether the violation that is subject to the continuing violation exception for statute of limitations purposes should be penalized as a "one time single offense" (using the first sentence in Section 16(a)(1))[1] or whether the violation is penalized using the "violation continues, each day is separate violation" approach set out in the second sentence of Section 16(a)(1). Elementis does not dispute that a violation that is found to warrant exceptional "continuing violations" treatment for statute of limitations purposes would have a maximum penalty that is computed using the second sentence of Section 16(a)(1), i.e. by treating each day the violation continues as a separate daily violation. That is a second way in which the continuing violation exception is relevant to Section 16(a)(1).

The more critical point for this case, however, is that Section 16(a)(1) has no relevance for this Board in deciding whether a violation of Section 8(e) is subject to the continuing violations statute of limitations exception. As just noted above, determining whether the

[1] "Any person who violates a provision . . . of this title shall be liable to the United States in an amount not to exceed [$32,500] for each such violation." 15 U.S.C. § 2614(a)(1).

continuing violations exception applies at all is the critical "first step" in this case for determining whether Elementis can be assessed *any* penalty. Section 16(a)(1), by its express language, applies only to the calculation of TSCA penalties when a violation continues; it does not indicate which violations should be deemed continuing for purposes of analyzing whether an action has been brought within the applicable limitations period. Indeed, Congress was careful to provide language that makes clear the very limited scope of Section 16(a)(1). The second sentence of Section 16(a)(1) is express in stating that "each day such a violation continues shall, ***for purposes of this subsection***, constitute a separate violation." (Emphasis added). The "subsection" is wholly devoted to calculating the maximum penalty – the subsection does nothing to describe particular substantive offenses or their elements. So, given the very limited purposes to which Section 16(a)(1) applies, Section 16(a)(1) does nothing to inform the Board of how it should determine the statute of limitations for any particular TSCA offense. Indeed, to conclude that Section 16(a)(1) does guide whether a particular offense is "daily" or is "continuing" for determining the statute of limitations would directly contravene Congress's direction, which states that this special provision regarding daily separate violations is only for purposes of the "subsection", i.e. only for purposes of calculating penalties under Section 16(a). Section 16(a)(1) only operates in the event one concludes an action has been timely brought – it does not operate for purposes outside the subsection, such as for the purpose of determining *whether* an action was timely brought.

The Board's prior cases are consistent with this approach to the statutory language in Section 16(a)(1). The Board, in referencing Section 16(a)(1) in a prior analysis of whether a violation is continuing, drew on Section 16(a)(1) *solely* for the purpose of concluding that

Congress contemplated the possibility that *some* violations of TSCA *could* be continuing violations. In *In re: Lazarus, Inc.*, 7 E.A.D. 318 (1997), the Board clearly explained that:

> TSCA section 16(a)(1) does not by itself indicate that the particular requirement at issue in Count 1 . . . is continuing in nature. Rather, TSCA section 16(a)(1) is evidence that Congress contemplated the *possibility* of continuing violations of TSCA. The section provides a framework for determining penalties in such situation. The penalty provision, however, does not transform every violation of TSCA into a continuing violation.

Lazarus, 7 E.A.D. at 368 (emphasis in original).

Thus, one must turn to other statutory language, and other principles of statutory interpretation, to decide whether Section 8(e), in particular, is subject to the continuing violations exception to normal statute of limitations rules. In doing that analysis, the Board must begin with the fact that there is no dispute that TSCA enforcement actions, such as the one now before the Board, are subject to the general five-year statute of limitations period of 28 U.S.C. § 2462, which provides that:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462 (emphasis added). Nor is there any dispute that, absent exceptional circumstances such as a clear directive from Congress, "[a] claim first accrues on the date that a violation first occurs." *National Parks and Conservation Ass'n, Inc. v. Tennessee Valley Authority*, 502 F.3d 1316, 1322 (11th Cir. 2007) (emphasis added); *see also, Gabelli v. S.E.C.*, 133 S. Ct. 1216, 1220 (2013) ("A claim accrues when the plaintiff has a complete and present cause of action") (internal quotations omitted); *3M Co. v. Browner*, 17 F.3d 1453, 1460 (D.C.

Cir. 1994) ("A claim normally accrues when the factual and legal prerequisites for filing suit are in place").

Admittedly, the analysis cannot end there. The Board has recognized an exception to the general rule for "continuing violations." *See Lazarus*, 7 E.A.D. at 377-379. Nevertheless, as noted at oral argument, the Supreme Court and lower courts have been very clear, and very firm, in indicating that the circumstances to apply this exception will be rare, perhaps so rare as to call into doubt aspects of the analysis that the Board has used in its prior cases. Indeed, the D.C. Circuit signaled long-ago its skepticism that a similar TSCA provision was subject to the continuing violations exception to normal statute of limitations. *3M*, 17 F.3d at 1455, fn. 2 (expressing "considerable doubt" about ALJ's determination that failure to submit a TSCA Section 5 Pre-manufacture Notice constituted a continuing offense). Ultimately, these cases simply leave no valid basis for this Board to conclude today that Section 8(e) is a continuing violation for statute of limitations purposes.

Moreover, even without the force of guidance from *Gabelli* and other more recent cases, the conclusion that Section 8(e) violations are not continuing offenses for statute of limitations purposes is fully consistent with the Board's earlier decided cases. In *Lazarus*, the Board set forth its test for determining the application of the continuing violations doctrine in the statute of limitations context:

> [The] methodology for determining whether requirements are continuing in nature looks first to the statutory language that serves as the basis *for the specific violation at issue.* Legislative history may be consulted in analyzing *the statutory language*. The implementing regulations may also contain indications of the nature of a requirement. The regulations are especially relevant where the substance of a requirement is found in the regulation rather than the statute (citations omitted). Words and phrases connoting continuity and descriptions of activities that are typically ongoing are indications of a continuing nature. *In contrast, a continuing nature may be negated by requirements that must be fulfilled within a particular time frame.*

Lazarus, 7 E.A.D. at 336-367 (emphasis added).

In short, the Board has previously stated that statutory language for terms that describe activities that are "typically ongoing" is an affirmative sign of a continuing violation and, conversely, that a requirement that must be fulfilled within a particular time frame affirmatively signals the opposite.

In this proceeding, the statutory provision that Elementis is alleged to have violated is Section 8(e) of TSCA:

> Any person who manufactures, processes, or distributes in commerce as chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately *inform* the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information.

15 U.S.C. § 2607(e) (emphasis added).[2] This provision contains no words or phrases indicating expressly that the requirement to provide information continues, nor are there any terms that convey a sense of continuous activity: the verb that describes the legal obligation is the verb "inform," ("shall immediately inform the Administrator") which connotes a distinct act that is completed at a discrete moment in time – or in the words of *Lazarus*, one does not typically "inform" as an ongoing activity; especially where the duty to inform involves discrete information received by the manufacturer at a discrete moment in time. Indeed, the duty to "inform" is indistinguishable from the obligation at issue in *Lazarus*, which the Board found did *not* establish a continuing violation – the duty to "prepare" a report. *See Lazarus*, 7 E.A.D. at 378 (distinguishing the duty to "prepare" a report, a discrete act, from the duty to "maintain" a

[2] Technically, the provision violated is Section 15(3), 15 U.S.C. § 2614(3), which states: "It shall be unlawful for any person to . . . fail to submit . . . information . . . as required by this chapter." In other words, Section 15(3) is violated only insofar as Section 8(e) has been violated through the failure to provide information that Section 8(e) requires be submitted. Thus, the parties have consistently referred to this matter as involving an alleged "8(e) violation," even if that is something of a brief, but accurate, shorthand for the full statutory provisions involved.

document and further noting that "the word 'have' . . . contemplates a continuing course of conduct rather than a discrete act."). Nor is it distinguishable from the duty in *Toussie v. United States*, 397 U.S. 112 (1970) the duty of each male to "present himself for registration," terms which the Supreme Court indicated gave no indication of a "prolonged course of conduct." *Toussie*, 397 U.S. at 120. On the flip side, the statutory language *is* clear that the requirement of Section 8(e) to provide information on substantial risk must be fulfilled within a particular timeframe, i.e., immediately, otherwise a violation has occurred. Thus, Section 8(e) both lacks affirmative language that suggests a continuing offense, while having temporal requirement language that affirmatively "negates" concluding that Section 8(e) is a continuing offense.

Finally, we note that, while the statutory text is controlling, there also is absolutely nothing in the legislative history *for this provision* that supports the position that the requirement to provide information was meant to create a continuing offense exception to the normal statute of limitations. In denying Elementis' Motion for Judgment on the Pleadings, Chief Judge Biro referenced the TSCA legislative history as support for her finding that Congress intended violations of Section 8(e) to be continuing violations. Specifically, she cited the Senate Committee on Commerce Report, stating that "Congress intended to ensure that the regulators received 'timely access to information regarding the health and safety studies concerning chemicals covered by the Act.' *See* S. Rep. No. 94-698, at 6." Order On Respondent's Motion For Judgment On The Pleadings, p. 11. There is no dispute that Congress wanted the information to be timely provided – the question is whether Congress decided that the interest in having the information reported was so fundamental, and so fundamentally different than the interests served by many other statutes that do have five year statute of limitations, that Congress in TSCA provided EPA the authority to bring a Section 8(e) case forever. Of course, nothing in the

legislative history Chief Judge Biro quotes or on which the Agency relies suggests any Congressional intention to create such an exceptional power. Thus, the Agency covets extraordinary power when it seeks to preserve the right to bring a case, no matter how dated and aged the information at issue (see oral argument concession that the Agency believes a case can be brought twenty years after the manufacturer first receives the Section 8(e) information). [3]

In connection both with the issue that Section 16(a)(1) is specifically limited to assessing issues of penalty and with respect to whether Section 8(e) creates a continuing violation, it is notable how easily Congress could have created a continuing violation had it intended a Section 8(e) violation to be continuing for statute of limitations purposes. For instance, Congress could have added the following sentence to the end of Section 8(e): "Such person is prohibited from manufacturing, processing or distributing in commerce a chemical substance for which it possesses information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment until such information is provided to the Administrator." But it did not. Congress also could have included the following language in Section 8(e): "The failure to inform the Administrator shall be a continuing violation and the period of limitations shall not begin to run until the Administrator is informed of such information." But it did not. Instead, it said nothing in Section 8(e) and, in Section 16(a), it limited what it said to the function of computing penalties. By contrast, Congress

[3] Agency's counsel appeared to suggest at argument that, narrow as the continuing violations exception may be, the exception might extend to all or nearly all of the nation's environmental statutes. See transcript at 111: Mr. Raack: "Well, it may be that environmental law, because of the very nature of the laws itself, and the meaning and the purpose behind each act, by the kinds of things, protection of health and the environment, decreasing or limiting exposure to dangerous chemicals, ensuring people don't have dirty water to drink, that people's air is clean enough to breathe, are the kinds of things that fall into that narrow category of the places and proper time to assign continuing violations." Of course, no court has ever suggested that environmental law enjoys a broad carve out to normal rules of statutes of limitations, and it is a startling claim that environmental law, simply by virtue of the interests it serves, should enjoy such a carve out. Such a claim is directly contrary to this Board's decision in *Lazarus*, which acknowledged there are environmental violations that are not subject to the continuing violations doctrine, and certainly cannot be reconciled with the various federal court decisions that have been cited in the opening briefs.

certainly knows how to write continuing violation language into a statute with clarity, and without any such limitations such as "for purposes of this subsection" that limit the Section 16(a)(1) language to computing penalties.[4]

In sum, the reference to "violations [that] continue" in Section 16(a)(1) cannot be used to bootstrap an argument that the requirements of Section 8(e) are continuing in nature for statute of limitations purposes. As the Board has pointed out in *Lazarus*, Section 16(a)(1) indicates only the possibility that some violations of TSCA may be continuing violations. It does not provide a basis for making any particular violation continuous. Nor does Section 8(e) contain any such language.

2. Address section 16(a)(1)'s designation that each day that a violation continues is a "separate violation." Specifically, explain whether, in order to recover penalties in this case, the Agency is required to demonstrate that the continuing violation exception to the statute of limitations applies, or whether section 16(a)(1)'s "separate violations" language on its own authorizes the Agency to recover penalties for violations.

EPA must demonstrate that a continuing violation exception applies to the statute of limitations to recover penalties. This enforcement action cannot be rescued through reference to Section 16(a)(1) and an associated effort to define the Section 8(e) failure to inform as a series of separate daily violations.

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[4] *See, e.g.,* 18 U.S.C. § 3284 ("The concealment of assets of a debtor in a case under Title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.") (cited in *United States v. Dunne*, 324 F.3d 1158, 1164 (10th Cir. 2003) as an example of clear Congressional direction to create a continuing violation exception).

The operative language of Section 16(a)(1) is "[e]ach day such a violation continues shall, *for purposes of this subsection*, constitute a separate violation of section 2614 or 2689 of this title." (emphasis added). Because the "subsection" -- 16(a)(1) -- deals with determining the civil penalty for violations of Section 15 and 409 of TSCA, the modifier "for purposes of this subsection" can only be interpreted one way: the remainder of the sentence is applicable only to establishing the civil penalty amount. Thus, only for purposes of calculating the civil penalty has Congress authorized that a violation which "continues" be treated as a series of separate daily violations. For instance, in the *Lazarus* case, where the Board found both continuing and non-continuing violations, this sentence in Section 16(a)(1) allowed the Agency to assess a separate penalty for each day that the continuing violation occurred. Without this sentence in Section 16(a)(1), the Agency would only be allowed to assess one penalty, not to exceed the single penalty maximum, because the violation, while continuing over multiple days, is still only one violation.

As noted above in addressing Question 1, given the very specific limiting language Congress has adopted, what the sentence "[e]ach day such a violation continues shall, *for purposes of this subsection*, constitute a separate violation of section 2614 or 2689 of this title," does not do is convert all violations of Section 8(e) into continuing violations. For purposes of the Board's second question, there is a similar, but distinct point: Section 16(a)(1) also does not make any particular violation that "continues" a series of discrete daily violations for purposes of statute of limitation analysis.

To read Section 16(a)(1) in such a way – to read it as signaling a Congressional intention that a Section 8(e) violation is, for statute of limitations purposes, to be treated as a series of separate and recurring daily violations until the report is submitted -- would require ignoring the

language Congress actually adopted and would create a scheme that has many of the same problems that are created if Section 8(e) is read as subject to the continuing violations statute of limitations exception. In sum, such an approach would have at least two significant flaws. First, the statute is clear that the authority to treat as "a separate offense" each day that a violation continues is for one, and only one, set of purposes – the "purposes of this subsection." The subsection deals with computing civil penalties, and penalties are calculated to serve purposes that differ completely from the purposes served by a statute of limitations. Compare TSCA Section 16(a)(2)(B), 28 U.S.C. Section 2615(a)(2)(B) (factors to be considered in setting penalty include, e.g., nature, circumstances and gravity of violation, ability to pay, history of prior violations, the degree of culpability and other factors that justice requires) with *Gabelli*, 133 S. Ct. at 1221 (discussing various purposes served by statute of limitations such as repose, elimination of stale claims, insuring evidence is not lost or memories faded). Thus, to transfer the "daily separate violations" approach Congress allowed for penalty calculation to the statute of limitations analysis would be mixing apples and oranges – the daily violations approach may make sense for a penalty calculation given the distinct purposes served by penalties, but it would completely disregard the very different purposes that a statute of limitations serves.

For example, treating the Section 8(e) violation as creating a series of separate daily violations, rather than a single continuing violation as the Agency has urged, runs into the following anomaly. If, in fact, each day is a separate violation, the date on which the claim for that violation "first accrues" would be each separate date on which the Administrator is not informed (because a claim certainly cannot accrue before the day passes on which the daily violation has occurred). In turn, under a daily violations approach, once one has gotten more than five years from the first violation date, with every passing day, one old violation would be

lost due to the statute of limitations (the violation that occurred on the day five years and one day earlier). In addition, one new violation would be added each day (the violation that occurred the prior day). At any moment in time, the prior five years would all be chargeable separate violations, within the statute of limitations period. This would continue, *ad infinitum*, unless the information is someday finally submitted to the Administrator.

The implication of that, from a statute of limitations perspective, is stunning. In year twenty, the Agency could bring a case, alleging five years of violations – one for each of the days in years fifteen through twenty. That result, allowing a case to be brought twenty years in the future from when the manufacturer first received the Section 8(e) information, would directly subvert the purposes a firm statute of limitations serves. It would, in effect, be an end-run around the statute of limitations that Congress set. The Supreme Court has been clear that such end-runs cannot be countenanced, no matter what creative theory might be brought to bear. *See, e.g.*, *Gabelli*, 133 S. Ct. at 1224 (rejecting use of "discovery rule" to toll statute of limitations because it would undermine the purposes a statute of limitations serves).

Second, such an approach would violate the statute's plain language. Section 16(a)(1) clearly states that the "daily violations" approach is for purposes of the "subsection." Had Congress wanted that approach to be available for statute of limitations or other purposes it could have readily made that clear, perhaps by simply eliminating the words "for purposes of this subsection," the words it deliberately chose to include. In fact, Congress has done so in other statutes,[5] just as it has clearly identified a "continuing violation" for statute of limitations

[5] *See* 7 U.S.C. § 4815(b)(3)(A) and (B): "(A) A person who fails to obey a valid cease-and-desist order issued under paragraph (1) by the Secretary, after an opportunity for a hearing, shall be subject to a civil penalty assessed by the Secretary of not more than $500 for each offense. (B) Each day during which such failure continues shall be considered a separate violation of such order."

purposes when it wished to do so. Nor has Congress indicated in Section 8(e) any intention for each day to be a separate violation – the Section makes no reference to any repeating time-period, so there would be no principled basis, with respect to statute of limitations analysis, in choosing a day-by-day approach versus some other time sequence. Given the absence of any specific language in Section 8(e) that authorizes the division of the single offense into discrete parts, it would be equally plausible to divide the offense into separate hourly, weekly, monthly or annual violations.

As noted at oral argument, there is, as to this case, a further procedural difficulty in the Board taking this approach. Elementis was not, in fact, charged with a series of separate violations. The Complaint charges "a violation" (singular), describes Elementis as committing "an unlawful act" (singular) and is further clear that this single violation, in the Agency's view, continued. See Complaint, Para. 50-52. Nowhere is it suggested that Elementis committed more than a thousand separate violations. Thus, at this point, if the Board concludes that the "separate violation" approach is the correct reading of the statute, a penalty based on the theoretical maximum of 1371 days of violation still cannot be imposed. To do so would be to penalize Elementis for violations that have never been charged. This would violate due process, the

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See also, 20 U.S.C. § 6083(f)(1): "Any failure to comply with a prohibition in this section shall be a violation of this section and any person subject to such prohibition who commits such violation may be liable to the United States for a civil penalty in an amount not to exceed $1,000 for each violation, or may be subject to an administrative compliance order, or both, as determined by the Secretary. Each day a violation continues shall constitute a separate violation."

See also, 49 U.S.C. § 31138(d)(1): "(d) CIVIL PENALTY – (1) If, after notice and an opportunity for a hearing, the Secretary of Transportation finds that a person (except an employee acting without knowledge) has knowingly violated this section or a regulation prescribed under this section, the person is liable to the United States Government for a civil penalty of not more than $10,000 for each violation. A separate violation occurs for each day the violation continues."

See also, 42 U.S.C. § 11045(a): ". . . The United States district court for the district in which the facility is located shall have jurisdiction to enforce the order, and any person who violates or fails to obey such an order shall be liable to the United States for a civil penalty of not more than $25,000 for each day in which such violation occurs or such failure to comply continues."

Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, and would be arbitrary, capricious and contrary to law.

Thus, the "separate daily violations" approach cannot be adopted, given the clear textual directives to the contrary and the broad policy effects that a "daily separate violations" approach would have for statute of limitations purposes. Even if adopted, it cannot be applied to Elementis in this case, given the underlying Complaint. In turn, that means that the Agency can prevail here if, and only if, Section 8(e) is subject to the continuing violations exception to the statute of limitations. There is no "daily separate violations" approach that is viable.

3. Address the following scenario: If the Board were to conclude that Elementis' failure to submit to the EPA Administrator the epidemiology study in question here constitutes a series of separate violations, for what period would Elementis be liable for per day penalties? For example, would Elementis be liable only for the five year period immediately preceding the filing of the complaint (as adjusted by the tolling agreement); or, would Elementis also be liable for violations that occurred outside this five year window based on the continuing violation exception to the statute of limitations in 28 U.S.C. § 2462? *See CSC Holdings, Inc. v. Redisi,* 309 F.3d 988, 992 (7th Cir. 2002).

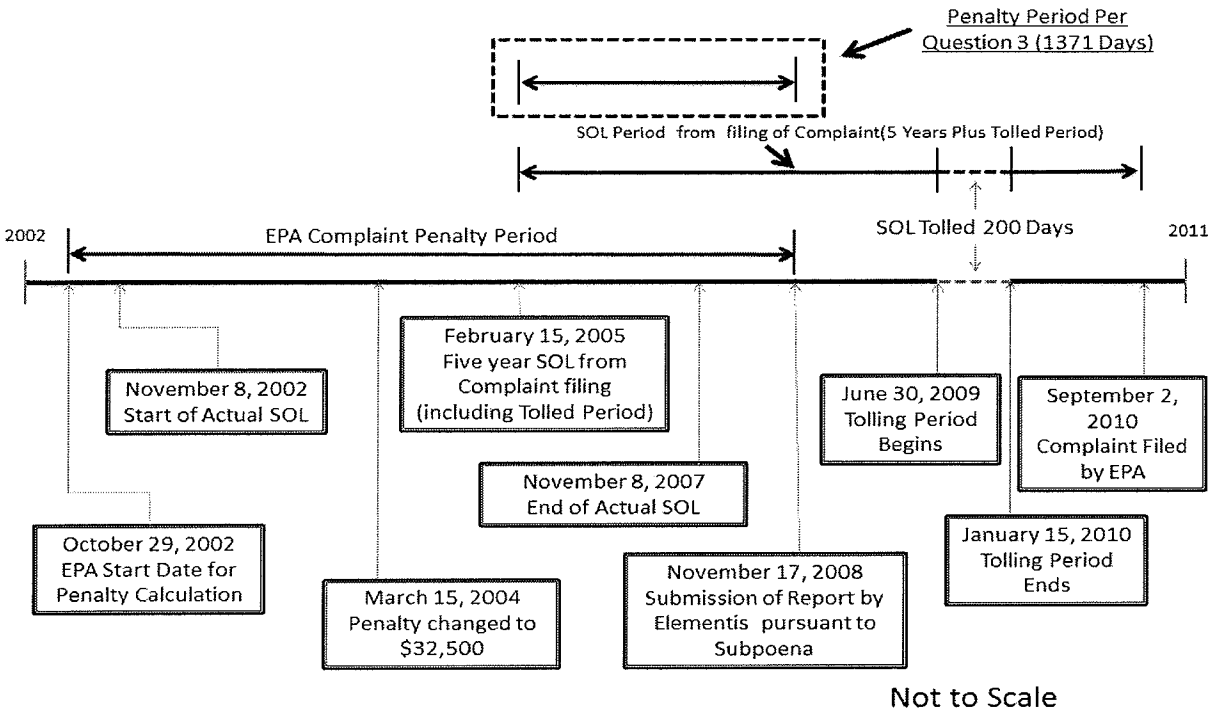
Elementis presumes that the Board intends by its hypothetical that the failure to submit the report would be a series of separate *daily* violations. Before discussing this hypothetical, it is important to note that, for the reasons discussed in the preceding sections, there is no basis in the statute or elsewhere to treat a violation of Section 8(e) other than as a non-continuing violation, which violation first accrues when the required information is not provided immediately. Moreover, even if a separate violations approach is legally correct, it has not been alleged in the Complaint.

Nonetheless, accepting the Board's instruction that we are to assume a series of separate daily violations (and ignoring the pleading defect in the Complaint), then 28 U.S.C. § 2462 would still limit how far back the Agency could go in seeking penalties. Section 2462 would limit the Agency to bringing an action for those separate violations that occurred within the period that is five years prior to the filing date of the complaint (in this case five years back from September 2, 2010, as further adjusted by the period of time tolled by the tolling agreements entered into by the parties). The date that is five years prior to the September 2, 2010 filing date is February 15, 2005, when adjusted to account for the tolled period (200 days).

The Board's question suggests that it is considering whether it can "mix and match" two separate arguments – first, treat each date that Elementis did not submit the Final Four Plant Study as a separate violation to thus conclude that this action is timely brought, but then also conclude that the offense is a continuing violation, thereby allowing penalties to be assessed for periods that pre-date the five year window. There is no support, either in the statute or the case law, that would permit the Board to "mix and match" in this way – to the contrary, when it comes to a statute of limitations analysis, the continuing violations approach and the "each day is a discrete violation" are directly at odds with each other. As the Sixth Circuit has noted, "[a] regular habit of violating the statute is not enough to convert multiple individual violations into one long continuing wrong." *CSC Holdings v. Redisi*, 309 F.3d 988, 992 (6th Cir. 2002). Thus, where one has multiple separate violations, "the continuing violation doctrine has no application." *Id.*

Given this, and assuming the "each day is a separate violation" approach, the calculation of the days involved in this case would be as follows. The first daily violation that would be within five years of the complaint (allowing for tolling) would have been February 15, 2005.

November 16, 2008 would be the last day on which a separate daily violation could have occurred – as there is no dispute that Elementis submitted to the Agency the information at issue on November 17, 2008. Thus, under the Board's hypothetical, the maximum period, even in theory, for which penalties could be assessed would be from February 15, 2005 to November 16, 2008 – a total of 1371 days. The diagram below depicts the applicable timelines.



4. Does a conclusion that Section 8(e) is not a "continuing violation" for statute of limitations purposes mean that a timely action brought within five years could not have penalties assessed on a daily basis?

Although the Board did not separately set this question to the parties, Elementis notes that the Board might also have asked whether a conclusion that Section 8(e) is not a "continuing violation" for statute of limitations purposes means that, in a future timely brought action, the

Administrator cannot secure penalties on a per day basis? The answer is "no," there is no such implication. Rather, there is an approach to the statute that can simultaneously protect Elementis' justifiable statute of limitations interests in this case, while preserving the Administrator's authority to secure daily penalties in future timely brought Section 8(e) cases. Put simply, this Board could conclude that Section 8(e) is not subject to the continuing violations exception to the statute of limitations, while also concluding that a Section 8(e) offense is a "violation that continues" for purposes of applying Section 16(a)(1) when calculating penalties in a timely brought case. Such an approach would respect the valuable role that a statute of limitations serves, as it would mean that the Agency would be required to bring a case within five years of when reportable Section 8(e) information is first received by a regulated party. It would thereby honor the purposes of repose and other values that are essential to achieving justice. *See Gabelli*, 133 S.Ct. at 1220. Then, once one is focused only on how to calculate penalties for timely brought claims, the Board might conclude that a Section 8(e) violation in a particular case is a "violation that continues," under Section 16(a)(1) for penalty calculation purposes.

To be sure, in this case, such an approach would mean that Elementis is not subject to a penalty, as this action was not brought within five years of when Elementis failed to immediately report. But such an approach would blunt the Agency's stated concern that the Board must adopt a "continuing violations exception" for statute of limitations purposes or else all Section 8(e) violations will be punished as a single, one-time, one-day event. Not so – for example, under this alternative approach the Agency could bring a case four years and 364 days after information should have been reported to the Administrator, and seek penalties for a maximum of $32,500 per day for each covered day within that period.

Such an approach is consonant with the case law. As the Board itself observed at argument, the courts use, and have used, the phrase "continuing violation" (and a number of variations on that phrase) in several different contexts, analyzing a variety of legal questions, ranging from statute of limitations, to venue, to the availability of injunctive relief when it is claimed that the requested relief is moot. *See, e.g. Center for Biological Diversity, Inc. v BP America Production, Co.*, 704 F.3d 413, 430 (5th Cir. 2013). In doing so, courts have recognized that these contexts are not interchangeable – for example, the fact that an offense is not a continuing violation for statute of limitations purposes need not dictate that it also is not a continuing violation for venue purposes. *See, e.g., United States v. Canal Barge Co., Inc.*, 361 F.3d 347, 353, (6th Cir. 2011) (a case deciding whether venue was proper and which, after citing *Toussie* and other statute of limitations cases, notes "[t]hese cases are distinguishable because they involve statute of limitations, not questions of venue . . . [T]he distinction is sensible in light of the different consequences that attach to a determination that a crime is a continuing offense for statute of limitations purposes as opposed to venue purposes . . . [I]f the crime is a continuing offense for statute of limitations purposes, the defendant may be prosecuted after a time at which he would otherwise have no exposure whatsoever. Thus, interpreting a crime as a continuing offense for statute of limitations purposes has more serious consequences than it does in the context of venue."). *Id.* So too here. The implications of concluding Section 8(e) is not a continuing violation for statute of limitations need not preclude using daily penalties for a timely brought Section 8(e) case, given the different purposes and considerations that inform a penalty assessment compared to the considerations in play when deciding a statute of limitations.

In sum, Section 16(a)(1) of TSCA does not lend any support to the conclusion that a violation of Section 8(e) of TSCA is a continuing violation for statute of limitations purposes.

The claim first accrues when the failure to immediately report first happens, thus triggering the five year window under 28 U.S.C. § 2462's plain language. There is no support from either the express language of Section 8(e) or the legislative history that Congress intended violations of Section 8(e) to be continuing in nature. To the contrary, the absence of express language is telling -- had Congress so intended it could have easily written such language into the provision, as it has done elsewhere. Nor has it made Section 8(e) a set of separate, daily violations. Therefore, the continuing violation exception does not apply to the five-year statute of limitations within which the Agency was required to bring a claim for a violation of Section 8(e) against Elementis. Nor can this action be "saved" through treating the matter as a series of separate discrete daily violations. Because there is no dispute that the Agency did not bring the claim within the applicable five-year time period, the Board must dismiss the Agency's claim against Elementis.

B. SECTION 8(E) MERITS ISSUES RAISED AT ORAL ARGUMENT

Elementis will address briefly three points raised at the oral argument relating to whether a violation of Section 8(e) occurred and how clear it would have been to Elementis that, in the Agency's view, the Final Four Plant Report was required to be submitted.

First, the Board inquired of Agency counsel whether OSHA had made a finding that the Final Four Plant Report did not provide new information of risk. Counsel acknowledged that OSHA had made such a finding but then sought to suggest that the finding was somehow of less import because OSHA must also be concerned with the economic feasibility and technological feasibility of the standards it imposes. Counsel claimed it was OSHA's concern for those economic/technical feasibility standards that drove the decision-making. It bears emphasis then, that, at the time of the OSHA rulemaking, OSHA did not explain itself in those terms, and the Agency has cited nothing from the contemporaneous OSHA final rule to that effect. Rather, this

effort to excuse and explain away why the Final Four Plant Report made no difference to OSHA all emerged at the administrative trial below. That reasoning was not recited in the rulemaking.

Thus, the Agency sits in a difficult position today – either the real reason OSHA did not regard the Final Four Plant Report as significant is the reason it gave at the time – i.e. that Gibb already demonstrated the risk and the Final Four Plant Report was not new information – or OSHA actually misled the public in its written statements accompanying the Rule at the time the Rule issued, dismissing the Final Four Plant Report without giving its "true reasons" – the reason asserted at trial below that there were economic and technological restraints that limited what OSHA could do, regardless of risk levels. As between those two options, this Board ought to presume that OSHA's official statements at the time – not its post-hoc rationalization offered below through a single witness – described OSHA's true and binding reasoning. And what OSHA truly concluded, it is clear, is that the Gibb study was the defining study in the field; others, including the Final Four Plant Report, added nothing new. See, e.g., U.S. Department of Labor, Occupational Safety and Health Administration, Occupational Exposure to Hexavalent Chromium; Final Rule, 71 Fed. Reg. 10,100 (Feb. 28, 2006) (Amending 29 C.F.R. Parts 1910, 1915, 1917, 1918 and 1926) CX 76, at 80-81 (OSHA rulemaking discussing many advantages of the Gibb study in terms of cohort size and other features).

Second, the Board inquired regarding the 1991 TSCA Guidance and the import it would have for the regulated community. Two points are worth noting about the ambiguity that the Guidance introduces, rather than resolves. First, the Guidance indicates that information need not be reported if "it is contained in an EPA report or study." U.S. Environmental Protection Agency, *TSCA Section 8(e) Reporting Guide*, (June 1991) CX 21, at 19. Thus, the very language of that Guidance suggests that risk information can be "contained in" a study rather than be the

whole of a study – i.e. risk information can be a subset of a study. In this case, however, the Agency seems to be taking the opposite approach – in its view every number, word, comma and period in the Final Four Plant Report had to reach the Agency or else the Administrator would not have received the required risk information. Similarly, that same Guidance emphasizes that a "serious toxic effect at a lower dose level" needs to be reported – that same section of the Guidance makes no mention of needing to report an effect "at a higher dose level." U.S. Environmental Protection Agency, *TSCA Section 8(e) Reporting Guide*, (June 1991) CX 21, at 19. Yet, that is precisely what the Agency is insisting needed to occur here – a report of risk found at a higher dose level.

Third, the Board inquired about the approach to reporting that regulated parties usually take, including in particular, do they submit the whole of a study or report? While Elementis has no reason to doubt that the general practice is what Agency counsel described – regulated parties typically submit the whole report -- that practice is both unsurprising but still uninformative about what the statute actually requires. Once a party has made a decision to provide information to the Administrator, it is sound risk management to provide the whole report and thereby avoid any later complaint from the Agency, whether the whole report was actually legally required or not. To conclude that a commonly followed practice must be what the law requires is to take the wrong path – what the law requires must be determined through reference to the statute.

C. CONCLUSION

For the foregoing reasons, as well as the reasons set forth in Elementis' Appeal Brief, its Reply Brief and at oral argument, Elementis respectfully requests that the Environmental Appeals Board dismiss the Environmental Protection Agency's Complaint against Elementis.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, John J. McAleese, III, hereby certify that on this 17th day of November, 2014, I served a copy of the foregoing Post-Argument Brief and Response to Requests from the Environmental Appeals Board of Respondent Elementis Chromium, Inc. via e-mail and Federal Express on the following:

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